1996 MP No. 2037

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

MISCELLANEOUS PROCEEDINGS

BETWEEN

VAN CAN ON and others — Applicants

and

(1) THE DIRECTOR OF IMMIGRATION

(2) THE DIRECTOR OF LEGAL AID

(3) THE REFUGEE STATUS REVIEW BOARD — Respondents

Before: The Hon. Mr. Justice Keith in Chambers

Date of Hearing: 18th July 1996

Date of Delivery of Judgment: 19th July 1996

J U D G M E N T

INTRODUCTION

On 17th July, I declined to order the Director of Immigration not to order the removal of 9 of the Applicants from Hong Kong pending the substantive hearing of their application for judicial review. I set out my reasons in the judgment which I delivered. The 9 Applicants propose to appeal against my order. They wish me to make an order which would have the effect of preventing their removal from Hong Kong pending the determination of that appeal. Their application was made to me at 5.00 p.m. yesterday afternoon. Although the application was made ex parte, the Director of Immigration was informed of the application, and Mr. Nicholas Cooney represented him.

At the conclusion of the hearing, I made an order which had the effect of preventing the Applicants' removal from Hong Kong for the time being, upon various undertakings given on their behalf by their solicitors, but I said that I would give my reasons this morning, when I would also identify the precise nature of the order I was making. That I now do.

THE MERITS OF THE APPLICATION

The Applicants' application requires me to strike the right balance between (a) the undesirability of interfering, even for a limited period, with the Director of Immigration's power under section 13E(1) of the Immigration Ordinance (Cap. 115) to order the removal of the Applicants from Hong Kong, and (b) the desirability of ensuring that the Applicants' appeal against my order of 17th July will not have been frustrated by their removal from Hong Kong in the meantime.

In my judgment, the merits are all one way. I do not believe that the Director of Immigration's plans for the orderly repatriation of Vietnamese migrants to Vietnam will be adversely affected by a temporary reprieve for these 9 Applicants. After all, the reprieve is only for the short time it will take for the appeal to be heard. There should, of course, be safeguards against the Applicants' stringing out the appeal in order to prolong their stay in Hong Kong. That is why I asked Mr. Matthew Gold for the Applicants whether the Applicants were prepared to undertake to file their Notice of Appeal by 4:30 p.m. next Tuesday, and to prosecute their appeal thereafter speedily. Since I do not have power to order an expedited hearing of the appeals, I also asked Mr. Gold whether the Applicants were prepared in addition to undertake that they would apply to the Court of Appeal for the appeal to be expedited. Mr. Gold informed me that all these undertakings would be given.

Moreover, I believe that important questions of principle are raised by my order of 17th July, and by the reasoning of my decision in *Do Manh Tuan v. The Director of Immigration* (HCMP 803/96) on which the order of 17th July was based. I do not want the Court of Appeal to be deprived of the opportunity of considering those questions simply because the Applicants have been repatriated to Vietnam in the meantime. In these circumstances, I am entirely satisfied that it would be right for me to make an order having the effect sought, provided that I have the jurisdiction to do so.

JURISDICTION

Mr. Cooney argued that the Court has no jurisdiction to make an order having the effect sought. In view of that, it is, I think, important to identify precisely what I was being asked to do. I was not being asked to stay the order I made on 17th July. I was being asked to order the Director of Immigration not to order the removal of the Applicants from Hong Kong for the time being. True, that was the very order I was being asked to make on 17th July. But I was then being asked to make the order in order to preserve the status quo until the application for judicial review could be heard. I am now being asked to make the order in order to preserve the status quo until the appeal from my order of 17th July can be heard.

That is the background against which Mr. Gold argued that there were two sources of the court's jurisdiction to make an order having the effect sought. I propose to deal with each in turn:

(i) Ord. 53 r. 3(10)(a). Ord. 53 r. 3(10)(a) provides:

> "Where leave to apply for judicial review is granted, then ... if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders."

There is no doubt that my power to make a direction of the kind contemplated by Ord. 53 r. 3(10)(a) has been triggered: leave to apply for judicial review has been granted, and the relief sought includes orders of certiorari to quash the decisions of the Director of Legal Aid and the

Director of Immigration which the Applicants challenge. The difficulty for the Applicants is that my power to direct that the grant of leave should operate as a stay relates only to a stay "of the proceedings to which the application relates". Those words have been construed by the Court of Appeal in England not to be confined to judicial or quasi-judicial proceedings. In *R. v. Secretary of State for Education and Science ex p. Avon County Council* [1991] 1 QB 558, it was held that the language is wide enough to enable the Court to impose a stay on "the process by which the decision challenged has been reached, including the decision itself". But I do not believe that that language is wide enough to enable the Court to impose a stay, not merely on the proceedings in which the decisions challenged were made (i.e. the legal aid appeals), but also on the exercise of a statutory power (i.e. the Director of Immigration's power to order the removal of the Applicants from Hong Kong) which arises as a result of a wholly different decision which the Applicants wish to challenge (i.e. the decisions of the Refugee Status Review Board refusing to accord the Applicants refugee status). Ord. 53 r. 3(10)(a), therefore, does not provide me with the jurisdictional basis to make an order having the effect sought.

(ii) The inherent jurisdiction of the Court. It is difficult to think of a phrase misused more often than "the inherent jurisdiction of the Court". It is invariably invoked when a litigant wishes the court to make an order in the absence of an express power to do so. It is assumed that the court has the power to make such an order if it is just to do so. That assumption is incorrect. The inherent jurisdiction of the court is an exceptional reserve power which the court has to make an order, even when no express power to make such an order exists, if such a power can

properly be inferred. Such a power would not, of course, be inferred lightly, and the situations in which this inherent jurisdiction can be invoked would be few and far between. I am afraid that I regard the order which Mr. Gold wishes me to make as being light years away from a proper invocation of that exceptional jurisdiction. I believe that I would be travelling along a path which went far beyond the limits of legal orthodoxy if I allowed myself to be seduced into giving effect to the merits under the guise of the court's inherent jurisdiction.

I therefore reject the two jurisdictional sources upon which Mr. Gold relied. Is there another jurisdictional source? I believe there is. It is to be found in section 21L(1) of the Supreme Court Ordinance (Cap. 4), which provides:

> "The High Court may by order (whether interlocutory or final) grant an injunction .... in all cases in which it appears to the High Court to be just or convenient to do so."

I can think of only two possible reasons why it might not be proper to invoke section 21L(1) in this case:

(i) Proceedings against the Crown. Until recently, it was thought that the Court could not grant interlocutory injunctions against the Crown in proceedings begun by judicial review: *R. v. Secretary of State for Transport ex p. Factortame Ltd.* [1992] AC 85. However, in *M. v. The Home Office* [1993] 3 WLR 433, the House of Lords held that the provision in the U.K. equivalent to section 21L(1), namely section 37(1) of the Supreme Court Act 1981, enabled interlocutory injunctions to be granted

against Crown servants in their official capacities. Mr. Cooney reserved his right to argue otherwise, but in my view the point is sufficiently arguable to justify the grant of interlocutory relief at this stage.

(ii) Alternative remedies. There is no doubt that there exist alternative routes by which the Applicants could ask the Court to prevent their repatriation to Vietnam for the time being. Two such routes spring to mind:

(a) The Applicants could wait until the Director of Immigration made an order for their removal. They could then apply to the Court for leave to challenge that order by judicial review, and if leave was granted, to apply for a stay of the order under Ord. 53 r. 3(10)(a) pending the outcome of the proceedings. However, in practice, that is not a course which is open to the Applicants. It is true that in *Do Manh Tuan*, a Vietnamese migrant was able to take that course, but I was told in *Do Manh Tuan* that the practice of the Director of Immigration is to make orders for removal only when the removal of the migrant is about to take place, and the only reason why Do Manh Tuan's solicitors managed to discover that his removal was imminent was because that was the inference which they correctly drew from his transfer to Victoria Prison from the detention centre in which he had been held.

(b) The Director of Immigration is unwilling to give an undertaking that he will not order the removal of the Applicants from Hong Kong pending the appeal. Accordingly, it is arguable

> that it is open to the Applicants to apply for leave to challenge the decision implicit in that refusal, namely his decision to order the Applicants' removal from Hong Kong whenever he wishes to do so. The relief which would be sought would be an order of prohibition prohibiting him from making such an order until the appeal is determined. However, that is not a practical course for these Applicants to take. The Applicants could not mount such an application without professional help. It may be that they would not get legal aid for such an application. There comes a time when even lawyers dedicated to the task of alleviating the plight of Vietnamese migrants can do no more on a pro bono basis. In any event, it would take time for such an application to be prepared, and in view of the unwillingness of the Director of Immigration to give an appropriate undertaking, time is the one commodity which the Applicants do not have.

The practical difficulties, therefore, which the Applicants face in pursuing these alternative routes to obtain a temporary respite from removal from Hong Kong plainly justifies the invocation of section 21L(1) in their cases.

CONCLUSION

For these reasons, on the undertakings to which I have already referred, the order which I make is an order restraining the Director of Immigration, and any other public officer acting under delegated powers, from making an order for the removal from Hong Kong of the 9 Applicants to which this application relates until after the determination by the Court

of Appeal of their appeal from my order of 17th July. Such an order will not prevent the Director of Immigration from applying to set aside this order if he wishes. Although he was given notice of this application, it remained ex parte, and Ord. 32 r. 6 gives the Court power to set aside an order made ex parte.

(Brian Keith)
Judge of the High Court

Mr. Matthew Gold of Messrs. Pam Baker & Co. for the Applicants

Mr. Nicholas Cooney, Senior Crown Counsel, for the 1st Respondent